SPECIAL CRIMINAL APPLICATION NO. 95 OF 1996.

Date of decision: 4 .4.1996.

For approval and signature

The Honourable Mr. Justice R. R. Jain

and

The Honourable Mr. Justice H.R. Shelat

Mr.K.G. Vakharia, Senior advocate for Mr. Tushar Mehta, advocate for the petitioner.
Mr. Nigam Shukla, A.P.P., for respondent No.1.
Respondents No.2, 4-7 served.
Respondent No.3-unserved.

1. Whether Reporters of Local Papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether their Lordships wish to see the fair copy of judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

Coram: R. R. Jain, J.

4th April , 1996.

Oral judgment (CAV) :(Per Jain, J.)

1. Petitioner, a social worker and resident of Bhuj, is facing several criminal proceedings initiated by respondents No.5 to 7 and are pending for investigation with respondents No.2 to 4. Being aggrieved by institution of criminal proceedings has filed this writ petition under Article 226 of the Constitution of India

read with Section 482 of Criminal Procedure Code ('Code' for short) praying for quashing of proceedings as being mala fide and politically motivated. By way of this petition, the petitioner has also prayed for declaration that Section 151 of the Code is unconstitutional and ultra vires and stay of further proceedings. Though the petitioner has prayed for declaration of Section 151 of the Code as unconstitutional and ultra vires, the entire petition sans even a whisper of allegation of facts touching this aspect. In absence of any allegation of facts challenging constitutional validity of Section 151 of the Code, the object of filing the petition can be ascertained from its reading as a whole. In my view, paragraph 2 of the petition makes it eloquently clear.

"2. The petitioner, by way of this petition, begs to approach this Hon'ble court under Article 226 of the Constitution of India as well as under section 482 of the Code of Criminal Procedure, praying for quashing of the criminal proceedings initiated by the respondent Nos.5 to 7 herein malafide at the instance of the respondent Nos.2, 3 and 4. The criminal proceedings initiated in the name of the respondent Nos.5 to 7 are respectively as under:

(1) Chapter case bearing No.2125/95 dated 16th December 1995 under section 151 of the Criminal Procedure Code filed by the respondent No.4 on a complaint obtained from the respondent No.5.

(2) FIR No.100/96 dated 9th January 1996 for the alleged offences punishable under sections 507, 506 and 504 of the IPC filed by the respondent Nos.2, 3 and 4 through the respondent No.6.

(3) FIR dated 30th December 1995 for the alleged offences punishable under sections 502, 506(2) and 114 of the IPC filed by respondent Nos.2, 3 and 4 through the respondent No.7.

Copies of the aforesaid criminal proceedings initiated by the respondent Nos.2, 3 and 4 in the names of the respondent Nos.5, 6 and 7 herein are annexed hereto and are respectively marked as ANNEXURE 'A', ANNEXURE 'B' and ANNEXURE 'C'".

Of course, in the rest of the paragraphs the petitioner has made reference to the evidence and circumstances which may lead the Court to arrive at just conclusion

about the purpose referred in paragraph 2 above.

2. As a cardinal rule, a relief claimed in any petition has to be supported by allegations of facts. In absence of any specific averment and allegation of facts will be difficult to appreciate rival contentions in its proper perspective as the adverse party not knowing the allegations would not be able to deny. Consequently, a prayer without pleading has no meaning and does not require any consideration. Thus, essentially the petition remains as a petition under Section 482 of the Code for quashing the proceedings initiated by respondents No. 5 to 7.

3. It would be pertinent to note that in this petition which is essentially for quashing process (even taking it a petition for challenging constitutional validity), the police officers, viz., investigating agency, have also been impleaded. Respondent No.2 is the District Superintendent of Police, District Kachchh, respondent No.3 is the Assistant Superintendent of Police and respondent No.4 is the Inspector of Police, Bhuj City whereas respondents No.5 to 7 are private parties who are alleged to have initiated criminal proceedings as referred in paragraph 2 of the petition. We fail to understand as to how police officers are necessary parties when the criminal proceedings are initiated by private parties. When the proceedings are initiated by private parties, the police officers being investigating agency, are bound to investigate in accordance with law as would be in discharge of legal duty. The investigating agency is an independent agency and on receiving information is only to investigate to unfold truth and take appropriate steps. In this view of fact, respondents No.2 to 4 are not at all necessary parties and appear to have been impleaded with ulterior motive of pressurising for not going ahead with the investigation.

4. Despite the fact that there are no pleadings touching to the virus or constitutional validity of Section 151 of the Code, learned counsel and Senior Advocate Mr. Vakharia for the petitioner has argued at length inviting our attention to various judgments, and therefore, we are constrained to deal with briefly.

5. It is argued that any detention as provided under Section 151 of the Code violates the fundamental rights of a citizen as is in violation of Articles 14, 21 and 22 of the Constitution of India. To appreciate his arguments and for convenience, Section 151 of the Code reads as under:

"Arrest to prevent the commission of cognizable offences:

151.(1) A police officer knowing of a design to commit any cognizable offence may arrest, without orders from a Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented.

(2) No person arrested under sub-section (1) shall be detained in custody for a period exceeding twenty-four hours from the time of his arrest unless his further detention is required or authorised under any other provisions of this Code or of any other law for the time being in force."

This Section authorises a police officer to arrest a person by way of preventive measure avoiding commission of cognizable offence. The power can be exercised even without warrant from Magistrate. If the police officer comes to know about design to commit cognizable offence can arrest the person so that commission of offence can be prevented. A person so arrested can be detained in custody only for a period of 24 hours except where further detention is authorised under any other provisions of the Code or or any other law for the time being in force. Thus, it becomes amply clear that the detention/arrest under this Section is not punitive but preventive. The powers are exercised with a view to see that the person so arrested does not act in any manner prejudicial to the maintenance of the public order. Maintenance of public law and order and peace is the paramount duty of police force and powers vested under Section 151 are exercised in discharge of paramount duty.

6. The powers conferred upon the authorities under Section 151 are well defined and guidelines are also laid down by enactment and, therefore, on the face of it cannot be said to be violative of Article 14 of the Constitution of India. A mere possibility of abuse of power is no ground for declaring provisions as ultra vires. A person arrested and detained under this Section is neither a convict nor an under trial prisoner. The powers are exercised with a view to prevent him from committing any offence as being prejudicial to maintenance of public order. The power has to be exercised obviously within the four corners of the enactment. Since the paramount object of this Section is to prevent commission of offence, naturally cannot be exercised against a person who believes in a particular

ideology or belongs to an action group or has resorted to hunger strike, etc., because these acts would not endanger law and order situation and maintenance of peace. Question about constitutional validity of Section 151 (3) as amended by Maharashtra Government arose before the High Court of Bombay in a case reported in ILR 1985 at page 2276 in the case of Shahaji Vishnu Lokhande v. N.P. Morgali and was upheld saying that powers to be exercised are not punitive but preventive and are well defined. Mr. Vakharia, learned senior counsel appearing for the petitioner, has placed heavy reliance upon the judgment of the Supreme Court in the case of Gopalan v. State of Madras, AIR 1950 SC 27 wherein the subject matter was interpretation of Article 19 of the Constitution of India in relation to guarantees to the citizens, enjoyment of civil liberties, i.e., right to freedom. The relevant observation has been made in paragraph 102 (page 69) as under:

"Accordingly, the first question for consideration is whether Arts.19 (1)(d) and (5) are applicable to the present case. "Liberty", says John Stuart Mill, "consists in doing what one desires. But the liberty of the individual mist be thus far limited--he must not make himself a nuisance to others." Man, as a rational being, desires to do many things; but in a civil society his desires have to be controlled, regulated and reconciled with the exercise of similar desires by other individuals. Liberty has, therefore, to be limited in order to be effectively possessed. Accordingly, Art.19, while guaranteeing some of the most valued phases or elements of liberty to every citizen as civil rights, provides for their regulation for the common good by the State imposing certain "restrictions" on their exercise. The power of locomotion is no doubt an essential element of personal liberty which means freedom from bodily restraint, and detention in jail is a drastic invasion of that liberty. But the question is: Does Art.19, in its setting in Part III of the Constitution, deal with the deprivation of personal liberty in the sense of incarceration? Sub.cl.(d) of cl.(1) does not refer to freedom of movement simpliciter but guarantees the right to move freely "throughout the territory of India". Sub.cl.(e) similarly guarantees the right to reside and settle in any part of the territory of India. And cl. (5) authorises the imposition of "reasonable restrictions" on these rights in the interests of the general public or for the

protection of the interests of any Scheduled Tribe. Reading these provisions together, it is reasonably clear that they were designed primarily to emphasis the factual unity of the territory of India and to secure the right of a free citizen to move from one place in India to another and to reside and settle in any part of India unhampered by any barriers which narrow-minded provincialism may seek to interpose. The use of the word "restrictions" in the various sub-clauses seems to imply, in the context, that the rights guaranteed by the Article are still capable of being exercised, and to exclude the idea of incarceration though the words "restriction" and "deprivation" are sometimes used as interchangeable terms, as restriction may reach a point where it may well amount to deprivation. Read as a whole the viewed in its setting among the group of provisions (Arts.19-22) relating to "Right to Freedom", Art.19 seems to my mind to presuppose that the citizen to whom the possession of these fundamental rights is secured retains the substratum of personal freedom on which alone the enjoyment of these rights necessarily rests. It was said that sub-cl.(f) would militate against this view, as the enjoyment of the right "to acquire, hold and dispose of property" does not depend upon the owner retaining his personal freedom. This assumption is obviously wrong as regards movable properties, and even as regards immovables he could not acquire or dispose of them from behind the prison bars; nor could be "hold" them in the sense of exercising rights of possession and control over them which is what the word seems to mean in the context. But where, as a penalty for committing a crime or otherwise the citizen is lawfully deprived of his freedom, there could no longer be any question of his exercising or enforcing the rights referred to is cl.(l). Deprivation of personal liberty in such a situation is not, in my opinion, within the purview of Art.19 at all but is dealt with by the succeeding Arts.20 and 21. In other words, Art.19 guarantees to the citizens the enjoyment of certain civil liberties while they are free, while Arts.20-22 secure to all persons--citizens and non-citizens--certain constitutional guarantees in regard to punishment and prevention of crime. Different criteria are provided by which to measure legislative judgments in the two

> fields and a construction which would bring within Art.19 imprisonment in punishment of a crime committee or in prevention of a crime threatened would, as it seems to me, make a reductio ad absurdum of that provision. If imprisonment were to be regarded as a "restriction" of the right mentioned in Art.19(1)(d), it would equally be a restriction on the rights mentioned by the other sub-clauses of cl.(1), with the result that all penal laws providing for imprisonment as a mode of punishment would have to run the gauntlet of cls.(2) to (6) before their validity could be accepted. For instance, the law which imprisons for theft would, on that view, fall to be justified under cl.(2) as a law sanctioning restriction of freedom of speech and expression. Indeed, a Division Bench of the Allahabad High Court in a recent unreported decision brought to our notice, applied the test of undermining the security of the State or tendering to overthrow it in determining the validity or otherwise of the impugned Act. The learned Judges construed Art.19 as covering cases of deprivation of personal liberty and held logically enough, that inasmuch as the impugned Act, by authorising preventive detention, infringed the right to freedom of speech and expression, its validity should be judged by the reservation in cl.(2) and, as it failed to stand that test, it was unconstitutional and void."

The subject matter was constitutional validity of Preventive Detention Act, 1915 and was held to be intra vires. The petitioner has also relied upon recent decision of the Supreme Court in the case of Joginder Kumar v. State of U.P., AIR 1994 SC 1349 dealing with right of arrested person. It is held that right of person arrested to have someone informed about his arrest and right to consult privately with lawyers are fundamental rights flowing from Articles 21 and 22 of the Constitution of India. The question before the Supreme Court in the case of Kharak Singh v. State of U.P., AIR 1963 SC 1295 was also secret picketing of house of suspect qua the effect of personal liberties and as per majority view, the intrusion into the residence of a citizen and the knocking at his door with the disturbance to his sleep and ordinary comfort which such action must necessarily involve, does not constitute a violation of the freedom guaranteed by Art.19(1) (d), as it is manifest that by the knock at the door, or by the man being roused from his sleep, his locomotion is not

impeded or prejudiced in any manner. The freedom guaranteed by Art. 19(1)(d) has reference to something tangible and physical rather and not to the imponderable effect on the mind of a person which might guide his action in the matter of his movement or locomotion. In the case of Nandini Satpathy v. P.L. Dani, AIR 1978 SC 1025, the mute question before the Supreme Court was the right of accused to keep silence during police interrogation. But the same was negatived, of course, keeping in mind the fundamental rights guaranteed under Article 20 of the Constitution of India, i.e., during interrogation the person cannot be compelled to give incriminatory testimony. Relevant observation is made in paragraphs 42 and 43 as under:

"42. Let us hypothesize a homicidal episode in which A dies and B is suspected of murder; the scene of the crime being 'C'. In such a case a bunch of questions may be relevant and yet be innocent. Any one who describes the scene as well-wooded or dark or near a stream may be giving relevant evidence of the landscape. Likewise, the medical evidence of the wounds on the deceased and the police evidence of the spots where blood pools were noticed are relevant but vis-a-vis B may have no incriminatory force. But an answer that B was seen at or near the scene, at or about the time of the occurrence or had blood on his clothes will be criminatory, is the hazard of inculpatory implication. In this sense, A answers that would, in themselves, support a conviction are confessions but answers which have a reasonable tendency strongly to point out to the guilt of the accused are incriminatory. Relevant replies which furnish a real and clear link in the chain of evidence indeed to bind down the accused with the crime because incriminatory and offend Art. 20 (3) if elicited by pressure from the mouth of the accused. If the statement goes further to spell in terms that B killed A. it amounts to confession. An answer acquires confessional status only if, in terms or substantially, all the facts which constitute the offence are admitted by the offender. If his statement also contains self-exculpatory matter it ceases to be a confession. Article 20 (3) strikes at confessions and self-incriminations but leaves untouched other relevant facts.

43. In Hoffman v. United States ((1950) 341 US 479) the Supreme Court of the United States

> considered the scope of the privilege against self-incrimination and held that it would extend not only to answers that would in themselves support a conviction but likewise embrace those which would furnish a link in the chain of evidence needed to prosecute the claimant. However, it was clarified that the link must be reasonably strong to make the accused apprehended danger from such answer. Merely because he fancied that by such answer he would incriminate himself he could not claim the privilege of silence. It must appear to the court that the implications of the question, in the setting in which it is asked, make it evident that a responsive answer or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The apprehension of incrimination from the answer sought must be substantial and real as distinguished from danger of remote possibilities or fanciful flow of inference. Two things need emphasis. The setting of the particular case, the context and the environment i.e., the totality of circumstances must inform the perspective of the court adjudging the incriminatory injury, and where reasonable doubt exists, the benefit must go in favour of the right to silence by a liberty construction of the Article. In Malloy v. Nagon, (1964) 12 L Ed 2nd 653), the Court unhesitatingly held that the claim of a witness of privilege against self-incrimination has to be tested on a careful consideration of all the circumstances in the case and where it is clear that the claim is unjustified, the protection is unavailable. We have summarised the Hoffman standard and the Malloy test. Could the witness (accused) have reasonably sensed the peril of prosecution from his answer in the conspectus of circumstances? That is the true test. The perception of the peculiarities of the case cannot be irrelevant in proper appraisal of self-incriminatory potentiality. The cases of this Court have used different phraseology but set down substantially the same guidelines."

Thus, in our view, the judgments referred to by the petitioner have no applicability to the facts of present case since the question is about taking preventive and not punitive measures. The detention under Section 151 is purely temporary and for limited purpose as provided

in the Act and, therefore, on the face it cannot be held to be ultra vires the Constitution of India. Dealing with scope of Section 151, similar view has also been taken by different High Courts in cases reported in:

In re Om Prakasha Gupta, AIR 1949 Madras 744,
Shravan Kumar v. Supdt. Dist.Jail, AIR 1957 All.189,
Prahalad Panda v. Province of Orissa, AIR 1950 Orissa 107,
Chakkappan v. State of Kerala, AIR 1960 Kerala 297.

7. The next question arising for our consideration is whether the proceedings in question are initiated with ulterior motive and in the abuse of process of law with a view to victimise. As regards exercise of inherent powers under Section 482 of the Code, the Supreme Court has laid down guidelines in a recent judgment in the case of State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335. According to the Supreme Court, the powers can be exercised under following circumstances:

"(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156 (1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155 (2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the

concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

The case of present petitioner does not fall within the parameters of anyone of the guidelines laid down by the Supreme Court and, therefore, question of staying and quashing does not arise. On prima facie reading of the complaints prima facie case is made out compelling the appropriate authority to take preventive measures.

8. The petitioner has also produced some photographs alleging police atrocities upon local residents and supporters of the petitioner. We may clarify at this stage that by way of this petition we are not called upon to enter into arena of police atrocities and take appropriate actions against concerned officers. We are not impressed very much on this count as it sans any supporting evidence, yet the affidavits filed on behalf of respondents Nos.2, 3 and 4 are quite eloquent. The affidavit in reply as well as paper reporting also make it abundantly clear that at the time when the petitioner was detained, a riotous situation had arisen, the mob resorted to pelting of stones and there was imminent danger to law and order situation and the authority vested with powers for maintenance of law and order situation was compelled to take actions to bring the situation under control wherein several police officers were also injured. Therefore, merely by seeing photographs it will be hazardous to arrive at conclusion about police atrocity, nor as a case of abuse of powers. At the most subject to appreciation of facts and circumstances may be a case of excessive exercise of powers. But even if that be so no material evidence is placed on record. Similarly, no medical evidence corroborating use of object alleged to have been used by police has also been produced. Assuming that the petitioner was illegally detained, the proper remedy would have been to approach the court for bail and not to compel the police authority to release under the pressure of local residents who assembled and resorted to agitation endangering law and order situation. On the contrary, it suggests that the petitioner deliberately

instigated and abetted the mob so that the police authority can succumb to pressure. In ordinary course, when any person is arrested or detained, may be illegally and wrongfully, aggrieved party has to move court and not to take law in hand. In this case, instead of taking recourse of law, the petitioner tried to muster support from local residents and influence the law enforcing authority to succumb to pressure. Even the petitioner also brought political pressure by causing Ex-Chief Minister to contact the police on phone and recommend release which is quite contrary to law. The material suggests that though involved in illegal and unlawful activities the petitioner is trying to exploit his political relations and contacts in demoralising law enforcing agency.

9. In light of foregoing discussion, we do not find any merit in the petition and, therefore, the petition is hereby rejected. Notice discharged.

10. After the judgment is pronounced, learned advocate for the petitioner, Mr. Mehta, requests for certificate under Article 134 read with Article 134-A for approaching the Supreme Court. In our view, it is not a fit case wherein certificate as requested is required to be issued. Hence, the request is rejected.